(10) No. 93-1883

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IN THE
Supreme Court of the United States
OCTOBER TERM, 1994

ELOISE ANDERSON, in her official capacity as Director of the California Department of Social Services and RUSSELL GOULD, in his capacity as Director of the California Department of Finance,

Petitioners,

v.

VERNA EDWARDS, Guardian ad Litem for Verna Edwards, *et al.*,

Respondents.

On Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

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BRIEF OF THE COUNCIL OF STATE GOVERNMENTS, NATIONAL CONFERENCE OF STATE LEGISLATURES, NATIONAL GOVERNORS' ASSOCIATION, NATIONAL ASSOCIATION OF COUNTIES, AND INTERNATIONAL CITY/COUNTY MANAGEMENT ASSOCIATION AS *AMICI CURIAE* IN SUPPORT OF PETITIONERS

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QUESTION PRESENTED

Whether federal law is violated by California's rule requiring all needy children who live together in the same household under the care of the same caretaker relative, and for whom AFDC benefits are sought, to be grouped together in a single AFDC assistance unit.

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INTEREST OF THE *AMICI CURIAE*

Amici, organizations whose members include state, county, and municipal governments and officials throughout the United States, have a compelling interest in legal issues that affect state and local governments. Every State operates an AFDC program pursuant to the scheme of

cooperative federalism established by statute. *See* Committee on Ways and Means, U.S. House of Representatives, 103rd Cong., 2d Sess., *Overview of Entitlement Programs: 1994 Green Book* 324 (Comm. Print 1994). AFDC is a very significant program for States, both fiscally and in terms of social policy. *See id.* at 389 (Table 10-21) (States' share of expenditures for AFDC benefits and administrative costs totalled $11.45 billion in 1993). Consequently, States have a vital interest in issues concerning their authority to make policy choices in implementing their AFDC programs. In addition, local governments in a number of States share in providing the non-federal portion of AFDC funding. *See id.* at 386-87 (Tables 10-18 and 10-19).

Many States have adopted assistance unit rules similar to California's. *See* Br. *Am. Cur.* State of Nevada *et al.* 5. As *amici* demonstrate below, these policy choices, as well as those made by States which have adopted a separate assistance unit or other approach, are fully permissible under federal law. The court of appeals' ruling thus erroneously narrowed the range of policy choice available to States. Moreover, because the court of appeals read the federal regulations in a manner which accorded no weight to the longstanding federal policy affording broad discretion to the States in the formulation of assistance units and in the distribution of benefits, its ruling also implicates broader issues concerning AFDC's framework of cooperative federalism.

Because of the importance of these issues to *amici* and their members, *amici* submit this brief to assist the Court in its resolution of this case.[1]

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[1] The parties have consented to the filing of this brief *amicus curiae*. Letters indicating their consent have been filed with the Clerk of the Court.

STATEMENT

Section 82-824.1 of California's Eligibility and Assistance Standards, Manual of Policies and Procedures (Sept. 1994) (MPP)[2] requires that when there is only one caretaker relative in the household there be only one assistance unit.[3] This means that all dependent children living within the same household and under the care of the same caretaker, whether siblings or non-siblings, will be grouped together in a single assistance unit, rather than divided among two or more separate assistance units.[4] California's rule does not require that AFDC benefits be sought for non-sibling children living in the household, *see* MPP § 82-820.3, but if the caretaker chooses to seek benefits for such children, they must be included in the same assistance unit as the other needy, dependent children within the household. MPP § 82-824.13.[5]

Because California's benefit payments under AFDC recognize economies of scale, the per capita benefit avail-

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[2] State of California, Department of Social Services, *Eligibility and Assistance Standards, Manual of Policies and Procedures* (Sept. 1994). The Manual includes state regulations pertaining to the administration of the AFDC program. *See* Pet. App. 17 n.2.

[3] The predecessor to § 82-824.1, § 44-205.31, contained a similar requirement concerning the configuration of assistance units. It was repealed and replaced with § 82-824.1 on October 1, 1991. *See* Pet. App. 17 n.3. Application of MPP §§ 44-205.31 and 82-824.13 was enjoined by the district court on May 8, 1992, Pet. App. 6-11, and the court's order required an emergency repeal of these sections within six months. Pet. App. 10, ¶ e. MPP § 82-824.13 was repealed effective November 1, 1992. *See* MPP § 82-824.13 (citing Manual Letter No. EAS-92-08).

[4] California does not require that children living in the same household but cared for by *different* caretakers be consolidated into the same assistance unit, except where the two caretakers are married or have a child in common. *See* MPP §§ 82-824.11-.12.

[5] If the caretaker is also needy and has chosen to seek benefits, she would be included in the same assistance unit as the needy children for whom she is caring. *See* 42 U.S.C. § 606(b); 45 C.F.R. § 233.10(b)(2)(ii)(*b*).

able to each member of the assistance unit decreases as the size of the assistance unit increases.[6] As a result, a household divided among two or more smaller assistance units would receive higher total benefits than a household consolidated together into one larger assistance unit. *See* Pet. 8.

In invalidating California's assistance unit rule, both the district court and the court of appeals concluded that they were bound by a prior opinion of the court of appeals, *Beaton v. Thompson*, 913 F.2d 701 (9th Cir. 1990).[7] In *Beaton*, the court of appeals struck down a Washington regulation similar to California's assistance unit rule on the grounds that it violated three federal regulations prohibiting the consideration of a non-legally responsible person's presence or the imputation of such non-legally responsible person's income in setting benefit levels. *See* 913 F.2d at 704 & n.2 (citing 45 C.F.R. § 233.20(a)(2)(viii); 45 C.F.R. § 233.90(a)(1), and 45 C.F.R. § 233.20(a)(3)(ii)(D)).

SUMMARY OF ARGUMENT

1. As the Court has recognized, "[t]he AFDC program is based on a scheme of cooperative federalism." *King v. Smith*, 392 U.S. 309, 316 (1968). Pursuant to that scheme, "States have considerable latitude in allocating their AFDC resources." *Id.* at 318-19. "Thus, the start-

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[6] Thus, under California's benefit schedule, the marginal additional payment for each additional child becomes progressively smaller as the assistance unit size increases. *See* MPP § 44-315.311; Cal. Welfare & Inst. Code § 11450(a)(1). The marginal benefit increase attributable to the addition of a child does not, however, represent the amount that new child "receives" or is entitled to use. *Cf. Dandridge v. Williams*, 397 U.S. 471, 477-78 (1970). Instead, the per capita benefit decreases for everyone in the assistance unit. *See* note 20, *infra*; Pet. Br. 14 n.5.

[7] Because *Beaton* contains the court of appeals' reasoning on this issue and was followed in the present case without additional analysis, *amici*'s references in this brief to the court of appeals' reasoning refers to the reasoning set forth in *Beaton*.

ing point of the statutory analysis must be a recognition that the federal law gives each State great latitude in dispensing its available funds." *Dandridge v. Williams,* 397 U.S. 471, 478 (1970).

California's assistance unit rule represents an exercise of the broad policymaking authority reserved to the States in the distribution of AFDC benefits. Federal law places only two limited conditions on the States' prerogative in configuring assistance units for purposes of distributing AFDC benefits, *see* 42 U.S.C. § 602(a)(38); 45 C.F.R. § 233.20(a)(1)(iii), leaving States with great flexibility in this area. *See* HHS Transmittal No. ACF-AT-94-6 (Mar. 16, 1994), *reprinted at* Pet. App. 33, 35. As the Court explained in *Jefferson v. Hackney*, the fact that some federal limitations exist "does not, however, enact by implication a generalized federal criterion to which States must adhere. Such an interpretation would be an intrusion into an area in which Congress has given the States broad discretion . . . ." 406 U.S. 535, 545 (1972) (footnote omitted).

California's policy choice concerning the configuration of assistance units resolves "the demands of its needy citizens with the finite resources available to meet those demands," *Dandridge,* 397 U.S. at 472, in the manner the State has found most appropriate. California made this judgment based on the economies of scale available to persons who live together as a household—a consideration which this Court has recognized as legitimate. *See, e.g., Bowen v. Gilliard,* 483 U.S. 586, 599-600 & n.14 (1987). The Court need not decide that California's policy choice is wise, but only that it falls within the broad policy authority retained by the States in AFDC's scheme of cooperative federalism. *See, e.g., Dandridge,* 397 U.S. at 487; *Jefferson,* 406 U.S. at 541.

2. California's assistance unit rule does not violate the federal regulations prohibiting consideration of the presence of a non-legally responsible person or the imputation

of income from such non-legally responsible person. The Department of Health and Human Services and its predecessor, the Department of Health, Education, and Welfare, have consistently read their own regulations as permitting States to consolidate assistance units in the manner California has chosen. *See* HHS Transmittal No. SSA-AT-86-1 (Jan. 13, 1986), *reprinted at* Pet. App. 44-50; HHS Transmittal No. ACF-AT-94-6 (Mar. 16, 1994), *reprinted at* Pet. App. 33-43; *Bray v. Dowling*, 25 F.3d 135, 142-43 (2d Cir. 1994).

The agency's interpretation of its own regulations must be given " 'controlling weight unless it is plainly erroneous or inconsistent with the regulation[s].' " *Thomas Jefferson University v. Shalala*, 114 S.Ct. 2381, 2386 (1994) (citations omitted). Deference to the agency interpretation is particularly appropriate here, given that the content of the agency's longstanding interpretation properly recognizes the wide range of choice afforded States within AFDC's scheme of cooperative federalism. *See New York State Dep't of Social Services v. Dublino*, 413 U.S. 405, 421 (1973).

The plain language of the pertinent regulations and the history of their promulgation further support the agency's longstanding interpretation. The regulations, by their terms, simply do not implicate California's assistance unit rule. The assistance unit rule neither considers the presence of, nor imputes the income of any non-legally responsible person, nor does it take into account resources which are not actually available and legally enforceable. *See* 45 C.F.R. §§ 233.20(a)(2)(viii), 223.20(a)(3)(ii)(D), and § 233.90(a)(1).

Instead, in determining the level of benefits to be paid to a non-sibling child, California properly takes into account the fact that other members of the household are receiving AFDC benefits and recognizes the economies of scale available to the household. Because federal and state law both require that the AFDC benefit payments

made to the assistance unit be expended to benefit the members of the unit, *see, e.g.*, 42 U.S.C. § 605; Cal. Welfare & Inst. Code § 11480, the money paid to the assistance unit as a whole is actually available to meet the needs of the non-sibling child.

Finally, respondents' alternative reading of the pertinent regulations is at odds with well-established features of the statutory scheme. The logical implication of respondents' position is that no child can be placed in an assistance unit with any other person who is not legally responsible for his or her care; the resulting decrease in per capita benefits would, by respondents' reasoning, be an improper consideration of such person's presence, or an imputation of such person's income. But the statutory scheme contemplates a number of instances in which persons who are not legally responsible for each other are nonetheless grouped together in assistance units. *See, e.g.*, 42 U.S.C. § 602(a)(38). The resulting decrease in per capita benefits to each member of the unit has never been held to be an improper imputation of income under the federal regulations; instead, it is recognized as an appropriate adjustment based on economies of scale realized by members of the assistance unit.

ARGUMENT

I. CALIFORNIA'S ASSISTANCE UNIT RULE IS A VALID EXERCISE OF THE STATES' AUTHORITY TO IMPLEMENT POLICY CHOICES UNDER AFDC'S SCHEME OF COOPERATIVE FEDERALISM

A. The States Have Broad Authority To Formulate Policy Concerning The Level And Distribution Of AFDC Benefits

As the Court has repeatedly emphasized, "[t]he AFDC program is based on a scheme of cooperative federalism." *E.g., Heckler v. Turner*, 470 U.S. 184, 189 (1985); *Dandridge v. Williams*, 397 U.S. 471, 478 (1970); *King v. Smith*, 392 U.S. 309, 316 (1968). The program is jointly funded by federal and state government on a matching fund basis.[8] While participation is voluntary for the States, *see, e.g. King*, 392 U.S. at 316, all States have chosen to participate. *See 1994 Green Book* at 324.

Although state AFDC plans must conform to federal requirements and receive approval from the Secretary of Health and Human Services, "[t]here is no question that States have considerable latitude in allocating their AFDC resources, since each State is free to set its own standard of need and to determine the level of benefits by the amount of funds it devotes to the program." *King*, 392 U.S. at 318-19 (footnotes and citation omitted).[9] "Thus,

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[8] The percentage of benefit costs paid by the federal government depends on the application of the matching formula used to determine Medicaid benefits and varies from State to State, ranging from 50% to nearly 80%. *1994 Green Book* at 324, 383-85 (Table 10-17). In all States, the federal government pays 50% of the administrative costs of the program. *Id.* at 383. In some States, local governments provide part of the nonfederal portion of the funding. *See id.* at 386-87 (Tables 10-18 and 10-19).

[9] *See also Rosado v. Wyman*, 397 U.S. 397, 408 (1970) ("the [AFDC] program is basically voluntary and States have tradition-

the starting point of the statutory analysis must be a recognition that the federal law gives each State great latitude in dispening its available funds." *Dandridge*, 397 U.S. at 478.

In *Dandridge*, for example, the Court upheld a Maryland regulation which established a welfare benefit ceiling (the maximum amount which any family, regardless of size, could receive in welfare benefits) even though this had the effect of providing the largest families "somewhat less than their ascertained per capita standard of need." *Id.* at 480. As the Court explained, "We see nothing in the federal statute that forbids a State to balance the stresses that uniform insufficiency of payments would impose on all families against the greater ability of large families—because of the inherent economies of scale—to accomodate their needs to diminished per capita payments." *Id.* at 479-80.

The Court has accordingly rebuffed efforts to erode the States' policymaking latitude in the distribution of AFDC benefits. In *New York State Dep't of Social Services v. Dublino*, the Court denounced a lower court ruling which invalidated work rules which New York had implemented as part of its AFDC program:

> This [lower court decision] is a sweeping step that strikes at the core of state prerogative under the AFDC program—a program which this Court has been careful to describe as a "scheme of cooperative federalism." It could impair the capacity of the state government to deal effectively with the critical problem of mounting welfare costs and the increasing financial dependency of many of its citizens. . . . The

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ally been at liberty to pay as little or as much as they choose"); *Dandridge*, 397 U.S. at 478 (stressing States' "'undisputed power,' under these provisions of the Social Security Act, 'to set the level of benefits and the standard of need'") (quoting *King*, 392 U.S. at 334); *Heckler*, 470 U.S. at 189 n.3 (State "is afforded 'broad discretion in determining both the standard of need and the level of benefits'") (quoting *Shea v. Vialpando*, 416 U.S. 251, 253 (1974)).

> problems confronting our society in these areas are severe, and state governments, in cooperation with the Federal Government, must be allowed considerable latitude in attempting their resolution.

413 U.S. 405, 413 (1973) (internal citations omitted). Similarly, the decision of the court of appeals in this case strikes at the core of state prerogative in the distribution of benefits, an area where longstanding, consistent federal law and policy have expressly afforded States broad latitude.

B. Defining An Assistance Unit For Purposes Of Distributing Limited Resources Is A Matter Of Policy That Is Squarely Within The States' Authority Under The Statutory Scheme

The federal statutory scheme imposes only two limited conditions on the States with respect to the configuration of assistance units. *See* Pet. App. 35 (1994 Transmittal). First, a State must include "any parent of [the dependent] child" and "any brother or sister of such child" in the same assistance unit "if such parent, brother, or sister is living in the same home as the dependent child." 42 U.S.C. § 602(a)(38); *see* 45 C.F.R. § 206.10(a)(1)(vii). Second, assistance units must be consolidated when the same person is required to be in two or more units. 45 C.F.R. § 233.20(a)(1)(iii). This means, for example, that the parent of a minor parent seeking assistance must be included in the same assistance unit as that minor parent and her child, if all are living in the same home. *See* Pet. App. 49 (1986 Transmittal).

As the Court noted in *Bowen v. Gilliard*, 483 U.S. 587 (1987), the purpose of Section (a)(38)'s assistance unit conditions, which were enacted as part of the Deficit Reduction Act of 1984, was to protect the federal fisc by "end[ing] the . . . practice whereby families exclude members with income in order to maximize family benefits." *Id.* at 593 (quoting S. Print No. 98-169). And as the Court also noted in *Gilliard*, these conditions, which were

premised on the economics of scale realized by family living arrangements, "unquestionably serve[] Congress' goal of decreasing federal expenditures." *Id.* at 599.

These conditions do not, however, otherwise constrain the States in their authority to determine policy with respect to the configuration of assistance units. To the contrary, the States retain substantial flexibility in determining their assistance unit policies.[10] Indeed, the statute expressly provides that a state agency

> shall, in determining need, take into consideration any other income and resources of any child or relative claiming aid to families with dependent children, or of any other individual (living in the same home as such child and relative) whose needs the State determines should be considered in determining the need of the child or relative claiming such aid.

42 U.S.C. § 602(a)(7)(A).

Respondents' suggestion that the statutory scheme prohibits the States from configuring assistance units in the manner that California has done here, *see* Opp. 6-7, is without merit. The fact that federal law places these limited conditions on the way in which a State exercises its flexibility in administering AFDC does not constrain the States' otherwise broad policy discretion. As the Court explained in *Jefferson v. Hackney*, the fact that some federal limitations have been placed on the scope of the States' authority to distribute benefits

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[10] At one point respondents expressly concede that "states have flexibility to define assistance units within the bounds of other federal requirements." Opp. 14. In making this concession, respondents correctly recognize that no *expressio unius est exclusio alterius* argument is available based on 42 U.S.C. § 602(a)(38). *See Bray v. Dowling*, 25 F.3d 135, 141-42 (2d Cir. 1994). As the Second Circuit observed in this regard, "[i]t would be anomalous to conclude that, as part of an act designed to reduce budget outlays, Congress would prohibit states from employing the cost-saving measure of including members of an extended family who reside together in a single AFDC assistance unit." *Id.* at 142.

> does not, however, enact by implication a generalized federal criterion to which States must adhere in their computation of standards of need, income, and benefits. Such an interpretation would be an intrusion into an area in which Congress has given the States broad discretion, and we cannot accept appellants' invitation to change this longstanding statutory scheme simply for policy consideration reasons of which we are not the arbiter.

406 U.S. 535, 545 (1972) (footnote omitted).

Moreover, as HHS, the agency charged with administering the AFDC program and interpreting § 602 has itself determined, "it is up to the State to establish policy on the number of assistance units in the household, e.g., when an individual not related to a member of an assistance unit as a parent, brother or sister lives in the household and files for assistance." HHS Transmittal No. SSA-AT-86-1 (Jan. 13, 1986), *reprinted at* Pet. App. 44, 50; *see* HHS Transmittal No. ACF-AT-94-6 (Mar. 16, 1994), *reprinted at* Pet. App. 33, 35 ("Apart from complying with these two Federal requirements, States are authorized to set the State-wide policy, to be applied to all cases, whether and under what conditions two or more assistance units in the same household are to be consolidated or retained as separate units."). Given the purpose of § 602(a)(38) and the fact that Congress has itself recognized the validity of configuring assistance units on the basis of the economies of scale which obtain in certain family arrangements, HHS's interpretation is a reasonable one which is entitled to deference. *See Chevron, U.S.A., Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837, 843-44, 865-66 (1984).[11]

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[11] In addition, as an exercise of Congress' power under the spending clause, *see Pennhurst State Sch. & Hosp. v. Halderman*, 451 U.S. 1, 17 (1981) (citing *Rosado v. Wyman*, 397 U.S. 397 (1970)), the AFDC program "is much in the nature of a contract: in return for federal funds, the States agree to comply with federally imposed conditions." *Id.* The Court has thus held that "if Congress intends

California's assistance unit rule, like the grant limits upheld in *Dandridge*, represents an attempt "to reconcile the demands of its needy citizens with the finite resources available to meet those demands." 397 U.S. at 472. The way in which California has chosen to resolve that tension is a matter of policy, which, under the federal statutory scheme, falls squarely within the authority of the States, not federal courts. *Cf. id.* at 487 ("the Constitution does not empower this Court to second-guess state officials charged with the difficult responsibility of allocating limited public welfare funds among the myriad of potential recipients"). Moreover, the policy which California has selected is based on a consideration that the Court has repeatedly affirmed as valid for setting AFDC benefits—the economies of scale that result from certain living arrangements.

The rationality of making economy of scale assumptions based on family arrangements was recognized by the Court in *Gilliard*, 483 U.S. at 599-600 & n.14. In upholding the requirement that child support payments to siblings be considered in determining the benefits available to the assistance unit, the Court accepted "the common sense proposition that individuals living with others usually have reduced per capita costs because many of their expenses are shared." *Id.* at 599 (quoting *Termini v. Califano*, 611 F.2d 367, 370 (2d Cir. 1979)). *See also Dandridge*, 397 U.S. at 479-80 (noting "inherent economies of scale" available to large families, which per-

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to impose a condition on the grant of federal moneys, it must do so unambiguously." *Id.* (footnote omitted). Section (a)(38) by no means conveys an unambiguous intent to impose on the States, as a condition of their participation in the AFDC program, a prohibition against the States combining separate assistance units residing within the same household where there is only one caretaker relative. As the Court noted in *Pennhurst*, "[t]here can, of course, be no knowing acceptance if a State is unaware of the conditions or is unable to ascertain what is expected of it." *Id.* at 17.

mit them "to accomodate their needs to diminished per capita payments").[12]

Hence, "[t]he decision to consolidate assistance units or to retain separate units in a single household is . . . a policy determination that a State makes balancing the equities." Pet. App. 42 (1994 HHS Transmittal). Of course, not every State will choose to strike the same balance with respect to the competing policy factors implicated in the definition of an assistance unit. Indeed, some States have chosen to place non-sibling children in separate assistance units, *see* Br. *Am. Cur.* Nevada at 5, perhaps persuaded by policy considerations similar to those that respondents raise here. In any case, it is not for the Court to decide which States have made the wiser choice. It is enough for the Court to determine that the choice made by California falls within the broad policy latitude granted States under AFDC.

The Court explained this principle in *Dandridge* in upholding Maryland's benefit limit for larger families:

> We do not decide today that the Maryland regulation is wise, that it best fulfills the relevant social and economic objectives that Maryland might ideally espouse, or that a more just and humane system could not be devised. Conflicting claims of morality and intelligence are raised by opponents and proponents of almost every measure, certainly including the one before us. But the intractable economic, social, and even philosophical problems presented by public welfare assistance programs are not the business of this Court.

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[12] In defining assistance units, a State might also consider potential effects on family structure, such as the fact that treating a non-sibling child as a separate assistance unit would enable extended families to increase their total benefits by placing children with nonparent caretakers. For example, if two sisters were both on AFDC and each had two children, the total combined benefits for the two families would be significantly increased if one of the sisters sent one of her children to live with the other sister.

397 U.S. at 487. And, as the Court emphasized in *Jefferson v. Hackney*, in upholding the AFDC benefit computation method selected by Texas,

> Striking the proper balance between these competing policy considerations is, of course, not the function of this Court. . . . So long as the State's actions are not in violation of any specific provision of the Constitution or the Social Security Act, appellants' policy arguments must be addressed to a different forum.

406 U.S. at 541.

II. CALIFORNIA'S ASSISTANCE UNIT RULE DOES NOT VIOLATE FEDERAL REGULATIONS

The court of appeals invalidated California's assistance unit rule based on its prior holding that such rules are inconsistent with three federal regulations: 45 C.F.R. § 233.20(a)(2)(viii); 45 C.F.R. § 233.90(a)(1), and 45 C.F.R. § 233.20(a)(3)(ii)(D). *See* Pet. App. 4; *Beaton*, 913 F.2d at 704. But HHS, which is charged with administering the statutory and regulatory scheme, has consistently interpreted its own regulations as permitting precisely the kind of flexibility in defining assistance units that California chose to exercise here. Under this Court's precedents, that interpretation is entitled to controlling weight unless an alternative reading is compelled by the plain language of the statute or by other indications of intent.

Here, the plain language of the regulations and the circumstances surrounding their promulgation provide additional support for the interpretation given them by HHS. Moreover, the alternative reading of the regulations by respondents and the court of appeals is incompatible with well-established features of the statutory scheme.

A. The Department Of Health And Human Services Has Consistently And Expressly Interpreted Its Regulations As Permitting States To Consolidate Assistance Units In The Manner Chosen By California, And That Interpretation Is Entitled To Controlling Weight

1. *The Department's Longstanding And Consistent Position Is That Its Regulations Permit States Broad Freedom To Define Assistance Units*

The Department of Health and Human Services and its predecessor, the Department of Health, Education and Welfare, have consistently taken the position that the applicable federal regulations give States broad discretion to define assistance units and to make policy concerning the inclusion of non-sibling children in the same assistance unit as other dependent children within the household. Thus, HHS's 1994 Transmittal interpreting the regulations to permit assistance unit rules such as California's does not represent a sudden change of course or a convenient litigation position, as respondents suggest, but rather is the reiteration of a longstanding policy that has been consistently followed since the 1970's.

In 1976, Robert Fulton, the Administrator of HEW's Social and Rehabilitation Service, explained in response to an inquiry concerning assistance units that where "a mother . . . is the caretaker relative for her own children and her sister's children[,] . . . the State may establish two budget units or it may include all children in one AFDC payment." Memorandum dated October 13, 1976 from Robert Fulton, Administrator, Social and Rehabilitation Service, to Alwyn L. Carty, Regional Commissioner, Region III, Social and Rehabilitation Service, *quoted in Bray v. Dowling*, 25 F.3d 135, 142 (2d Cir. 1994).

A few years later, HEW was requested to submit its views in *Allen v. Hettleman*, 494 F. Supp. 854 (D. Md. 1980), a case involving Maryland's policy of requiring a minor parent and her child to be included in the same

assistance unit as the minor parent's caretaker relative. There, HEW emphasized that "states are free to prescribe the composition of an AFDC assistance unit and the budgeting method they will use for such unit[,]" noting that "Federal regulations anticipate that states will differ in defining their assistance units . . . ." *Id.* at 861 (quoting letter of Secretary of HEW); *see also Bray*, 25 F.3d at 142.[13]

Then, in a 1986 Transmittal, HHS made a similar point in the context of interpreting the regulation requiring certain family members to be included in the same assistance unit. Transmittal No. SSA-AT-86-1 (Jan. 13, 1986), *reprinted at* Pet. App. 44-50. There, the Department stated that, aside from the mandatory federal requirements concerning assistance units, "it is up to the State to establish policy on the number of assistance units in the household." Pet. App. 50.[14] Respondents argue that

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[13] Subsequent federal enactments required that the parent of a minor parent receiving AFDC be included in the same assistance unit as that minor parent and her child. *See* 42 U.S.C. § 602(a)(38); 45 C.F.R. § 233.20(a)(1)(iii); *see also* Pet. App. 49 (1986 Transmittal).

[14] The discretion afforded States in consolidating assistance units is also highlighted elsewhere in the 1986 Transmittal:

> A mother and her child live with her second husband, who is disabled, and his child. Both parents receive AFDC, but as separate units. (In this situation, there is no requirement to consolidate assistance units, *though the State may choose to do so.*)

Pet. App. 49 (emphasis added). *See also* 57 Fed. Reg. 30132, 30136 (July 8, 1992) (noting that "depending on State policy," a stepbrother and his natural parent "could receive benefits as part of the same assistance unit [as a dependent child and his mother], or in a separate unit"). *Cf.* 48 Fed. Reg. 28398, 28401 (June 21, 1983) (allowing States to define the term "household" for proration purposes "in keeping with the President's commitment to assure States adequate flexibility in developing their own programs"); *id.* at 28402 ("In keeping with the intent of Congress and the President's concern for State flexibility, we have decided not to place constraints on States which would result from inserting Federal definitions in the final regulations.").

the 1986 Transmittal "merely refers to state flexibility to define assistance units," and note that they themselves "agree that states have flexibility to define assistance units within the bounds of other federal requirements." Opp. 14. But the 1986 Transmittal expressly contemplates that a state policy could require consolidation of assistance units "when an individual not related to a member of an assistance unit as a parent, brother or sister lives in the household and files for assistance." Pet. App. 50. That, of course, is the precise situation presented here, where a non-sibling dependent child (who is not related to a member of the assistance unit as a parent, brother, or sister) lives in the household and files for assistance.

The Department's most recent articulation of this view is contained in a Transmittal dated March 16, 1994. Transmittal No. ACF-AT-94-6, *reprinted at* Pet. App. 33-43. In that Transmittal, HHS restated its longstanding policy of affording States broad discretion to define assistance units, and reaffirmed that its regulations do not restrict state latitude to consolidate assistance units within the same household. *See* Pet. App. 34 (describing the purpose of the Transmittal). The 1994 Transmittal expressly addressed the precise issue presented here—the validity under HHS's regulations of state requirements that assistance units within the same household be combined into a single assistance unit where there is only one caretaker. *See generally* Pet. App. 33-43.

After carefully considering the history and purpose of 45 C.F.R. §§ 233.20(a)(2)(viii), 233.20(a)(3)(ii)(D), and 233.90(a)(1), and drawing on its prior interpretations, the Department affirmed that "[t]he decision to consolidate assistance units or to retain separate units in a single household is . . . a policy determination that a State makes balancing the equities." Pet. App. 42. To make its interpretation of its own regulations unmistakably clear, the Department included examples in the

Transmittal which further illustrate the legitimacy of the policy California has selected. *See* Pet. App. 40-42.[15]

2. *The Department's Longstanding Interpretation Must Be Given Controlling Weight In The Absence Of An Alternative Reading Compelled By The Regulation's Plain Language Or By Other Indications Of Intent*

The Court has consistently stressed that courts "must give substantial deference to an agency's interpretation of its own regulations." *Thomas Jefferson University v. Shalala*, 114 S. Ct. 2381, 2386 (1994) (citations omitted.)[16] As the Court recently elaborated in *Thomas Jefferson University*:

> Our task is not to decide which among several competing interpretations best serves the regulatory purpose. Rather, the agency's interpretation must be given " 'controlling weight unless it is plainly erroneous or inconsistent with the regulation.' "

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[15] Respondents' suggestion that the 1994 HHS Transmittal is entitled to a lower degree of deference because of the involvement of Mary Jo Bane in litigation concerning New York's assistance unit rule (*see* Opp. 15) is without merit. The Transmittal merely reiterates longstanding Department policy which predates any such litigation. Thus, the present situation is completely different from that in *Bowen v. Georgetown University Hospital*, 488 U.S. 204, 213-14 (1988), where the Court held that deference to an agency position which was "nothing more than a convenient litigating position," and which conflicted with prior interpretations urged by the Secretary, was inappropriate.

[16] *Cf. Dublino*, 413 U.S. at 421 ("[i]n interpreting this [AFDC] statute, we must be mindful that 'the construction of a statute by those charged with its execution should be followed unless there are compelling indications that it is wrong . . . .") (quoting *Red Lion Broadcasting Co. v. FCC*, 395 U.S. 367, 381 (1969)); *see also Miller v. Youakim*, 440 U.S. 125, 144 (1979) ("Administrative interpretations are especially persuasive where, as here, the agency participated in developing the provision.").

Id. at 2386 (quoting *Udall v. Tallman*, 380 U.S. 1, 16 (1965); *Bowles v. Seminole Rock & Sand Co.*, 325 U.S. 410, 414 (1945)).

Thus, courts "must defer to the Secretary's interpretation unless an 'alternative reading is compelled by the regulation's plain language or by other indications of the Secretary's intent at the time of the regulation's promulgation.'" *Id.* at 2386-87 (quoting *Gardebring v. Jenkins*, 485 U.S. 415, 430 (1988)). Here, the Secretary's interpretation is clearly entitled to "controlling weight," since it is wholly consistent with the plain language and history of the regulations. *See* pp. 21-26, *infra*.

The Court has further explained that the "broad deference" afforded an agency's interpretation of its own regulation "is all the more warranted when, as here, the regulation concerns 'a complex and highly technical regulatory program,' in which the identification and classification of relevant 'criteria necessarily require significant expertise and entail the exercise of judgment grounded in policy concerns.'" *Thomas Jefferson University*, 114 S. Ct. at 2387 (quoting *Pauley v. BethEnergy Mines, Inc.*, 501 U.S. 680, 697 (1991)).[17]

Finally, in this case there is an additional factor weighing in favor of deference to the Department's longstanding

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[17] The AFDC program is part of the Social Security Act, which the Court has described as "among the most intricate ever drafted by Congress" with a "Byzantine construction, [which,] as Judge Friendly has observed, makes the Act 'almost unintelligible to the uninitiated.'" *Schweiker v. Gray Panthers*, 453 U.S. 34, 43 (1981) (citations and footnote omitted); *see Wilkes v. Gomez*, 32 F.3d 1324, 1329 (8th Cir. 1994) ("AFDC is certainly a complex and highly technical regulatory program, and the issue at hand, which involves the allocation of limited AFDC resources, necessarily entails the exercise of judgment grounded in policy concerns."). *Cf. Schweiker*, 453 U.S. at 43 ("Perhaps appreciating the complexity of what it had wrought, Congress conferred on the Secretary exceptionally broad authority to prescribe standards for applying certain sections of the Act.").

interpretation—the fact that the content of that interpretation recognizes the role of state choice within AFDC's scheme of cooperative federalism. It is thus consistent with this Court's admonition that state policy choices should not be lightly overridden where, as here, "coordinate state and federal efforts exist within a complementary administrative framework, and in the pursuit of common purposes." *Dublino*, 413 U.S. at 421.

3. *The Plain Language Of The Federal Regulations And The History Of Their Promulgation Support The Department's Consistent Interpretation*

An examination of the language and purpose of each of the federal regulations at issue here establishes that the Department's interpretation is the correct one. Nothing in the regulations or their history supports respondents' alternative reading.

45 CFR § 233.20(a)(3)(ii)(D). This regulation, which embodies "the availability principle," states that "income and resources" are not considered "available" unless and until they are either "actually available" or "the applicant or recipient has a legal interest in a liquidated sum and has the legal ability to make such sum available for support and maintenance." 45 C.F.R. § 233.20(a)(3)(ii)(D).

In *Heckler v. Turner*, 470 U.S. 184, 200 (1985), the Court explained that the availability principle "has served primarily to prevent the States from conjuring fictional sources of income and resources by imputing support from persons who have no obligation to furnish it . . . ." Accordingly, "the Court's cases applying the principle clearly reflect that its purpose is to prevent the States from relying on imputed or unrealizable sources of income artificially to depreciate a recipient's need." *Id.* at 201.

California's assistance unit rule does not assume that any such fictional or unrealizable sources of income will be available to the non-sibling children included in the

assistance unit. In determining the amount to be paid to the assistance unit as a whole, California takes into account only those amounts that are actually available to the assistance unit (*e.g.*, AFDC benefit payments). Moreover, the caretaker is obligated to expend the benefits paid to the assistance unit to meet the needs of everyone in the assistance unit. *See* Cal. Welfare & Inst. Code § 11005.5 ("[a]ll money paid to a recipient or a recipient group as aid is intended to help the recipient meet his individual needs, or, in the case of a recipient group, the needs of the recipient group . . . ."). California law provides that "[a]ny person other than a needy child, who willfully and knowingly receives or uses any part of an aid grant paid pursuant to this chapter for a purpose other than support of the needy children and the caretaker involved, is guilty of a misdemeanor." Cal. Welfare & Inst. Code § 11480; *see* 42 U.S.C. § 605 (authorizing enforcement actions "[w]henever the State agency has reason to believe that any payment of aid to families with dependent children made with respect to a child are not being or may not be used in the best interests of the child"); *Wilkes*, 32 F.3d at 1330 ("[m]embers of an assistance unit are bound together by the caretaker's obligation to spend AFDC funds in their best interests") (citing 42 U.S.C. § 605).[18] The non-sibling child included in the assistance unit thus has an enforceable legal interest in the benefits paid to the assistance unit.

The fact that per capita benefits paid to the assistance unit decrease as the assistance unit size increases does not reflect any imputation of income, or any assumption that

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[18] *See also Bray v. Dowling*, 25 F.3d 135, 144 (2d Cir. 1994) ("Federal law can be read to mandate 'that the caretaker use all of the [AFDC] grant for the benefit of everyone in the assistance unit.'") (quoting *MacInness v. Commissioner of Public Welfare*, 593 N.E.2d 222, 226 (Mass. 1992)); *Jackson v. O'Bannon*, 633 F.2d 329, 336 (3d Cir. 1980) ("The entire AFDC program relies on the integrity of the parent or custodian who is expected to disburse the child's grant in accordance with the statutory purpose.").

money will be forthcoming from other members of the household or any other source. Instead, the per capita decrease that results from an increase in the size of an assistance unit reflects California's judgment concerning the economies of scale that are realized with larger households. *See* discussion *supra* at pp. 13-14.

Nor does the assumption that the benefit money will be shared by all of the people within the assistance unit implicitly impute any person's "share" of the benefit payment to others within the assistance unit. Indeed, it is not even accurate or meaningful to view the benefits paid to the assistance unit as a whole as the "income" of particular people within the household; instead, under the law, the benefits are paid on behalf of the entire assistance unit and are required to be used to meet the needs of the group as a whole. *See* Cal. Welfare & Inst. Code § 11005.5. *Cf.* Cal. Welfare & Inst. Code § 11480; 42 U.S.C. § 605. As the Eighth Circuit has noted, "[i]ndividuals do not receive AFDC funds, assistance units do." *Wilkes*, 32 F.3d at 1330.

Respondents also argue that an improper imputation of income would occur if one of the persons in the household were to receive separate income, such as a child support payment, based on the fact that this income to a member of the assistance unit would decrease the assistance unit's benefit payment and, by extension, decrease the per capita benefit amount available to the non-sibling. But in *Gilliard*, the Court held that child support payments to one sibling can properly be used to reduce the benefit amount available to the assistance unit, based on the reality that the support money will be used for the benefit of everyone in the household. 483 U.S. at 600.[19] Recognizing such

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[19] The Court noted that the fact that money may be in some sense "earmarked" for a particular child does not preclude its use for others in the family: "Although it is true that money which was earmarked for a specific child's or children's 'best interest' becomes a part of a larger fund available for all of the children, the differ-

realities involves no impermissible imputation of income, even though the sibling who receives the support payments is not in any way "legally responsible" for the support of anyone else within the assistance unit. The same considerations apply with equal force here.

45 C.F.R. § 233.20(a)(2)(viii). This regulation prohibits States from "prorat[ing] or otherwise reduc[ing]" benefits "solely because of the presence in the household of a non-legally responsible individual" and from "assum[ing] any contribution from such individual for the support of the assistance unit." It was implemented pursuant to the Court's decision in *Van Lare v. Hurley*, 421 U.S. 338, 346-48 (1975), which invalidated a New York rule which assumed that anyone residing in the same household with AFDC recipients was a "lodger" making contributions towards the household's shelter costs. It is clear from the history of the regulation's promulgation that it was never designed to affect the configuration of assistance units, but was instead targeted at the imputation of income from a person within the household, but outside the assistance unit. An examination of the language of the regulation confirms that view.

The California assistance unit rule does not condition the amount of benefits on the mere "presence in the household" of any non-legally responsible individual or on any presumed contributions from such an individual. Instead, the rule, in determining benefit levels, takes into account the fact that others in the household are also receiving AFDC benefits from the State, and makes a judgment about the economies of scale available to the household and to the caretaker who is fulfilling a statutory role in expending the benefits.

It is not the "presence" of the caretaker or her children in the household which affects the benefit levels of the

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ence between these concepts is, as we have discussed, more theoretical than practical." *Gilliard*, 483 U.S. at 606.

non-siblings; it is the caretaker's role in caring for both non-siblings and siblings pursuant to the statute, and the siblings' status as benefit recipients, which is relevant. Indeed, the fact that the caretaker is legally bound to use the benefit payments in the best interests of everyone within the assistance unit removes the caretaker from the category of a "non-legally responsible individual" entirely, *see, e.g., Wilkes,* 32 F.3d at 1329, making the regulation plainly inapposite.

45 C.F.R. § 233.90(a)(1). This regulation represents HEW's codification of the Court's holding in *King v. Smith,* 392 U.S. 309 (1968). *See Van Lare,* 421 U.S. at 345. In *King,* the Court struck down Alabama's "man-in-the-house" rule on the ground that Congress could not have intended to leave children in such circumstances without meaningful protection. The Court reasoned that "[c]hildren who are told, as Alabama has told these appellees, to look for their food to a man who is not in the least obliged to support them are without meaningful protection." 392 U.S. at 330.

The resulting regulation was specifically targeted at preventing such a result. It provides that "the inclusion in the family, or the presence in the home, of a 'substitute parent' or 'man-in-the-house' or any individual other than one described in this paragraph is not an acceptable basis for a finding of ineligibility or for assuming the availability of income by the State." 45 C.F.R. § 233.90 (a)(1). Thus, the regulation "precludes treating a person who is not a natural or adoptive parent as a breadwinner 'unless the bread is actually set on the table.'" *Van Lare,* 421 U.S. at 346 (quoting *Lewis v. Martin,* 397 U.S. 552, 559 (1970)).

Again, there is no indication of an intention on the part of the Department to apply this regulation *within* an assistance unit—the regulation is instead directed at imputation of income from outside of the assistance unit. In any case, the regulation clearly does not prohibit Cali-

fornia's assistance rule. California's assistance unit rule, by considering only the benefits and other resources actually available to the assistance unit, ensures that, in this Court's words, "the bread is actually set on the table." *Id.* In contrast to a "man-in-the-house" or "substitute father" without any obligation to provide support, the caretaker is actually receiving benefit payments on the non-sibling child's behalf and is obligated to use those benefit payments in the best interests of everyone in the assistance unit.

B. The Alternative Reading Of The Federal Regulations Urged By Respondents Has No Validity

An examination of respondents' reading of the federal regulations reveals that it is not only at odds with the plain language and purpose of those regulations, but also inconsistent with well-established features of the statutory scheme's operation. This flaw becomes apparent when the implications of the reasoning used by the respondents and the court of appeals to draw the California rule within the scope of the federal regulatory prohibition are considered.

Respondents' interpretation of the regulations hinges on their construction of a completely artificial benchmark—the amount a particular non-sibling child would receive, as an assistance unit of one, if placed in a home with persons who are not AFDC recipients. Respondents then suggest that it is inequitable or "absurd" for the child, regardless of living circumstances, to receive anything less than this benchmark amount. Opp. 2-3; 16-17. They argue that any shift from this benchmark through inclusion in a larger assistance unit—and the concomitant decline in per capita benefits available to each person [20]—

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[20] Respondents' characterization of the decline in benefits available to the non-sibling child when he or she is made a member of a larger assistance unit is inaccurate. Respondents erroneously confuse the *marginal* increase in total benefits provided to the assist-

is illegitimate because it considers the presence of, and implicitly imputes the income of, persons who are not legally responsible for the non-sibling child's support—*i.e.* the caretaker relative and the other children in her care.

But States' AFDC programs have long operated on the assumption that the per capita amount a particular child will receive may properly depend on that child's living situation—specifically, whether there are other members of the household eligible for benefits, and whether there are economies of scale relevant to the benefit amount. And, as the Court has expressly held, adjusting benefit amounts to properly reflect living arrangements has been the exclusive domain of the States. *See Dandridge*, 397 U.S. at 480 ("since the statute leaves the level of benefits

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ance unit as a result of the addition of another person with the amount the non-sibling "receives." *See* Opp. 2-3 & App. 1 (asserting that the non-sibling would only "receive" $117 in benefits, based on the fact that increasing an assistance unit from two persons to three persons yields an increase in benefits to the assistance unit as a whole of $117); *see also* Opp. 16-17 (asserting that the non-sibling child will "receive $101 if her aunt happens to have three children" and "$91 if her aunt is taking care of two other AFDC children in addition to three of her own").

As the Court recognized in *Dandridge*, however, this is not an accurate way of characterizing the decrease in per capita benefits that results when the size of an assistance unit increases:

> Although the appellees argue that the younger and more recently arrived children in such families are totally deprived of aid, . . . [i]t is no more accurate to say that the last child's grant is wholly taken away than to say that the grant of the first child is totally rescinded. In fact, it is the *family* grant that is affected.

397 U.S. at 477-78 (emphasis in original).

Thus, to take respondents' example of a child who is added to the assistance unit of an aunt and a cousin, it is more accurate to say that all three of the persons in the newly configured assistance unit have had their per capita benefits decreased to $202.33—one-third of the total benefit amount granted a three-person household in California. *See* Pet. Br. 14 n.5 (setting forth benefit schedule under Cal. Welfare & Inst. Code § 11450 and corresponding per capita benefit amounts).

within the judgment of the State, [the statutory] language cannot mean that the 'aid' furnished must equal the total of each individual's standard of need in every family group").

By respondents' reasoning, *no* child could ever be placed in an assistance unit with *any* other person who is not legally responsible for his or her care; the resulting decrease in per capita benefits would, according to respondents, be an improper consideration of such person's presence, or an improper imputation of such person's income. This, of course, is not the law. The federal statutory scheme expressly requires that certain persons who are not legally responsible for one another's support nevertheless be grouped together in assistance units.

Siblings and half-siblings, for example, are not responsible for the support of one another, yet they are required to be grouped in the same assistance unit if they live in the same household, even though this results in a per capita decrease in benefits for each sibling. *See* 42 U.S.C. § 602(a)(38). One sibling cannot complain that his or her per capita benefits are unfairly reduced because of the "presence" in the household of another sibling or that sibling's "income" in the form of benefits or child support payments. *See Gilliard*, 483 U.S. at 599 & 600 n.14. Likewise, the statutory scheme requires in certain instances that a grandchild be placed in the same assistance unit as a grandparent, *see* 45 C.F.R. § 233.20(a)(1)(iii); 42 U.S.C. § 602(a)(38), even though grandparents are not legally responsible for grandchildren under California law, *see* Cal. Family Code § 3930, and even though the inclusion of the grandparent has the effect of reducing the per capita benefits available to the grandchild.[21]

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[21] The regulations upon which respondents rely do not contain any exception for siblings or for grandparents and grandchildren who are grouped together pursuant to the statutory requirements. This demonstrates that the regulations, by their terms, do not ban the grouping together of persons who are not legally responsible for each other's support. Thus, respondents' attempt to characterize

Moreover, a caretaker relative is only entitled to benefits by virtue of the fact that she is caring for a dependent child, and would not be entitled to receive benefits as her own assistance unit. *See* 42 U.S.C. § 606(b) (noting that caretakers can receive assistance); *id.* § 606(a) (listing relatives who can receive assistance as caretakers). Hence, the statute contemplates that a needy caretaker relative with no dependent children of her own, who chooses to seek assistance,[22] will be grouped in an assistance unit with the needy, dependent child in her care. This is true even though the caretaker relative would not otherwise be required under state law to support the child, and even though this grouping reduces the child's per capita benefit compared to what the child would receive if placed in a non-needy family.

Like this case, such cases do not implicate the federal regulations, because it is not the mere "presence" of the non-legally responsible individuals that affects benefit levels; it is their role as benefit recipients within the same economic unit as the dependent child in question. Nor is there any improper imputation of income or presumption that funds will be available. In each case, the funds are considered available because they *are* available—in the form of benefit checks provided to the household pursuant to statute, which the caretaker is required by law to expend for the benefit of those in the assistance unit. *See* 42 U.S.C. § 605; Cal. Welfare & Inst. Code § 11480.

Thus, by construing the federal regulations so as to invalidate assistance unit rules such as California's, the court of appeals has given them a meaning that is not

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the sibling filing rule as a congressionally created "exception" to the principles set forth in the regulations, *see* Opp. 5, is unpersuasive.

[22] There is no requirement that a nonparent caretaker relative be included in the dependent child's assistance unit. *See* MPP § 82-828.2 (listing a nonparent caretaker relative as an "Optional Person" to be included in the assistance unit "upon request by the applicant/recipient").

only at odds with their plain meaning and their history, but also fundamentally at odds with the federal statutory scheme itself. Such a construction clearly does not offer a viable alternative to the interpretation consistently given the regulations by HHS.

CONCLUSION

The judgment of the court of appeals should be reversed.

Respectfully submitted,

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